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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-676
Miscellaneous

THEODORE Q. CHILDS,

Petitioner,

against

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT, MILTON MOLLEN, Presiding Justice, and FRANK D. O'CONNOR, LEON D. LAZER, FRANK A. GULOTTA and GUY J. MANGANO, Justices of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department,

Respondents.

Motion for Leave to File Petition for a Writ of Mandamus and Petition for a Writ of Mandamus.

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Table of Contents.

	Page
Motion for Leave to File Petition for Writ of Mandamus	1
Petition for a Writ of Mandamus	3
Opinions Involved	4
Jurisdiction	4
Question Presented	5
Constitutional Provisions Involved	5
Statutes Involved	7
Statement of the Case	8
Reasons for Granting Writ	11
Conclusion	25
APPENDIX:	
Opinion and Order of the Supreme Court of the United States in Childs v. Childs, No. 77-1653, March 19, 1979	27
Decision and Order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, dated July 11, 1979, A. D. 2d , 419 N. Y. S. 2d 533	29
Order and Memorandum Decision of the Court of Appeals, State of New York, dated October 9, 1979	48

Page

Decision of The Court of Civil Appeals, State of Alabama in Orr v. Orr, Civ. 1006, dated May 30, 1979, on remand from the Supreme Court of the United States 49

CASES.

Adkins v. Children's Hospital, 261 U. S. 525 (1923) 20

Ascione v. City of New York, 84 Misc. 2d 414, 377 N. Y. S. 2d 599 (1975), modified, Blyn v. Bartlett, 50 A. D. 2d 442, 379 N. Y. S. 2d 616, affirmed, 39 N. Y. 2d 349, 384 N. Y. S. 2d 99 18

Bright Homes, Inc., v. Wright, 8 N. Y. 2d 157, 203 N. Y. S. 2d 67 (1960) 19, 21, 22

Bucolo v. Adkins, 424 U. S. 641, 96 S. Ct. 1086 (1976) 24

Caban v. Mohammed, No. 77-6431, 440 U. S. , 99 S. Ct. 1760 (April 24, 1979) 23

Childs v. Childs, No. 77-1653, March 19, 1979, 440 U. S. , 99 S. Ct. 1488 ..... 4, 5, 8, 10, 11, 12, 13, 16, 21, 23, 25

Childs v. Childs, A. D. 2, 419 N. Y. S. 2d 533 (July 11, 1979) 5, 8, 10, 13, 15, 19, 26

Clason Management Corp. v. Temporary State Housing Rent Commission, 29 Misc. 2d 258, 217 N. Y. S. 2d 287 (1961) 19

Deen v. Hickman, 359 U. S. 57, 79 S. Ct. 1 (1958) 24

Erkenbach v. Erkenbach, 96 N. Y. 456 (1883) 17

Ex parte State of Texas, 315 U. S. 8, 62 S. Ct. 418 (1942) 24

Page

In *re* Adoption of Malpica-Orsini, 36 N. Y. 2d 568, 37 N. Y. S. 2d 511 (1975), appeal dismissed, Orsini v. Blasi, 423 U. S. 1042, 96 S. Ct. 765 (1976) 22

Kates v. Lefkowitz, 28 Misc. 2d 210, 216 N. Y. S. 2d 1014 (1961) 19

Kessel v. D'Amato, 97 Misc. 2d 675, 412 N. Y. S. 2d 303 (1979) 19

Kuhn v. Curran, 184 Misc. 788, 56 N. Y. S. 2d 737 (1945) 19

Leffler v. Leffler, 50 A. D. 2d 93, 376 N. Y. S. 2d 176 (1975), affirmed, 40 N. Y. 2d 1036, 391 N. Y. S. 2d 855 (1976) 17

Martin v. Hunter's Lessee, 1 Wheat. (14 U. S.) 304, 4 L. Ed. 97 (1816) 23, 24

Matter of Palmer v. Spaulding, 299 N. Y. 368, 87 N. E. 2d 301 (1949) 22

Mertz v. Mertz, 271 N. Y. 466, 3 N. E. 2d 597 (1936) 22

NAACP v. State of Alabama *ex rel.* Flowers, 377 U. S. 288, 84 S. Ct. 1302 (1964) 23

Northrup v. Northrup, 43 N. Y. 2d 566, 402 N. Y. S. 2d 997 (1978) 17

Orr v. Orr, No. 77-1119, 440 U. S. , 99 S. Ct. 1102 (1979) 8, 11, 12, 15, 16, 17, 21

Orr v. Orr, Alabama Court of Civil Appeals, May 30, 1979, unreported 16, 17

Orsini v. Blasi, 423 U. S. 1042 (1976), 96 S. Ct. 765 22

Page

People v. Bielecki, 56 Misc. 2d 730, 291 N. Y. S. 2d 217 (1968) 18

People v. Billi, 90 Misc. 2d 568, 395 N. Y. S. 2d 353 (1977) 22

People v. Caswell-Massey Co., 7 A. D. 2d 727, 180 N. Y. S. 2d 611 (1959) 22

People v. Friedman, 302 N. Y. 75, 96 N. E. 2d 184 (1950) 18

People v. Kupprat, 6 N. Y. 2d 88, 188 N. Y. S. 2d 483 (1959) 18

People v. Morton, 156 N. Y. 136, 50 N. E. 791 (1898) .. 18

People v. Scher, 76 Misc. 2d 71, 349 N. Y. S. 2d 902 (1973) 19

People v. Stuyvesant Insurance Co., 98 Misc. 2d 210, 413 N. Y. S. 2d 843 (1979) 22

People v. System Properties, Inc., 2 N. Y. 2d 330, 160 N. Y. S. 2d 859 (1957) 19, 22

Rathbun v. United States, 355 U. S. 109, 78 S. Ct. 161 (1957) 20

Tormey v. LaGuardia, 278 N. Y. 450, 17 N. E. 2d 126 (1938), motion denied, 279 N. Y. 780, 18 N. E. 2d 864 22

Touche Ross & Co. v. Reddington, June 18, 1979, No. 78-309 U. S. , 99 S. Ct. 2479 16

Trade Accessories v. Bellet, 184 Misc. 962, 55 N. Y. S. 2d 361 (1945), appeal dismissed, 295 N. Y. 763, 66 N. E. 2d 127 18

U. S. v. Carolene Products Co., 304 U. S. 144, 58 S. Ct. 778 (1938) 18

STATUTES.

Page

Section 237, subdivision (b), of the New York Domestic Relations Law 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 19, 22, 25

Title 28, U.S.C.A., Section 1651 (a) 3, 4, 7

CONSTITUTIONS.

Constitution of the United States, Fourteenth Amendment, Section 1 ..... 5, 10, 12

Constitution of the United States, Article I, Section 1 ..... 6, 17, 18

Constitution of the United States, Article III, Section 1 ..... 6, 18

Constitution of the United States, Article VI, Clause 2 25

Constitution of the State of New York, Article III, Section 1 ..... 6, 17, 18

Constitution of the State of New York, Article VI, Section 5, subdivision (a) 6, 18

Constitution of the State of New York, Article VI, Section 7, subdivision (a) 7, 18

MISCELLANEOUS.

Gilbert & Sullivan, The Mikado, Act II (1885) 21

Webster's Third International Dictionary of the English Language, Unabridged (1976) 20

In the

Supreme Court of the United States

October Term, 1979.

No.
Miscellaneous

Theodore Q. Childs,

Petitioner,

against

Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, Milton Mollen, Presiding Justice, and Frank D. O'Connor, Leon D. Lazer, Frank A. Gulotta and Guy J. Mangano, Justices of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department,

Respondents.

Motion for Leave to File Petition for a Writ of Mandamus.

The Petitioner respectfully moves this Court for leave to file the Petition for a Writ of Mandamus, hereto annexed, and further moves that an Order and Rule be entered and issued directing the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, Milton Mollen, Presiding Justice,

and Frank D. O'Connor, Leon D. Lazer, Frank A. Gulotta and Guy J. Mangano, Justices of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, to show cause why a Writ of Mandamus should not be issued against them in accordance with the prayer of said Petition, and why the Petitioner should not have such other and further relief in the premises as may be just and meet.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES,

October Term, 1979.

No. .
Miscellaneous

THEODORE Q. CHILDS,

Petitioner,

against

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT, MILTON MOLLEN, Presiding Justice, and FRANK D. O'CONNOR, LEON D. LAZER, FRANK A. GULOTTA and GUY J. MANGANO, Justices of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department,

Respondents.

Petition for a Writ of Mandamus.

Petitioner prays that a Writ of Mandamus issue under Section 1651(a) of the Judicial Code (28 U.S.C.A., Section 1651[a]) to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, Milton Mollen, Presiding Justice, and Frank D. O'Connor, Leon D. Lazer, Frank A. Gulotta and Guy J. Mangano, Justices of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, directing the said Appellate Division

of the Supreme Court of the State of New York and the said justices thereof to comply with the mandate of this Court issued on April 17, 1979 in *Childs v. Childs,* No. 77-1653, March 19, 1979, 440 U. S. , 99 S. Ct. 1488, appended *infra* at p. 27, and directing the said Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, and the aforesaid justices thereof, to vacate its Decision and Order dated July 11, 1979 and to enter an order in conformity with the aforesaid mandate of this Court, thereby preventing an evasion and annulment of the judgment and opinion of this Court.

Opinions Involved.

Opinion and Order of the Supreme Court of the United States in *Childs v. Childs,* No. 77-1653, March 19, 1979, 440 U. S. , 99 S. Ct. 1488, appended *infra* at p. 27.

The Decision and Order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department dated July 11, 1979 A. D. 2d , 419 N. Y. S. 2d 533, appended *infra* at p. 29.

Order and Memorandum Opinion of the Court of Appeals of the State of New York dated October 9, 1979, N. Y. 2d , appended *infra* at p. 48.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1651(a) on the ground that the Decision and Order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, dated July 11, 1979, and of the aforesaid justices thereof, violated the mandate of the Supreme Court of

the United States issued on April 17, 1979 in *Childs v. Childs,* No. 77-1653, which remanded the case "for further consideration in light of *Orr v. Orr,* 440 U. S. (1979);" and evaded and annulled the said judgment and opinion of this Court.

Question Presented.

Whether the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, and Milton Mollen, Presiding Justice, and Frank D. O'Connor, Leon D. Lazer, Frank A. Gulotta and Guy J. Mangano, Justices thereof, violated the mandate of the Supreme Court of the United States issued on April 17, 1979 in *Childs v. Childs,* No. 77-1653, by its Decision and Order dated July 11, 1979 determining Section 237, subdivision (b), of the New York Domestic Relations Law to be constitutional under the Equal Protection Clause of the Constitution of the United States by engaging in judicial legislation by substituting "spouse" for "wife" and "spouse" for "husband" in the aforementioned statute and, thereafter, remitting the matter to the trial court in the State of New York for hearing *de novo.*

Constitutional Provisions Involved.

The Fourteenth Amendment to the Constitution of the United States which provides:

> Section 1. "* * * [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 1 of the Constitution of the United States which provides:

> "All legislative Powers herein granted shall be vested in a Congress of the United States, * * *."

Article III, Section 1 of the Constitution of the United States which provides:

> "The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Article III, Section 1 of the Constitution of the State of New York which provides:

> "The legislative power of this State shall be vested in the Senate and Assembly."

Article VI, Section 5, subdivision (a), of the Constitution of the State of New York which provides:

> "Upon an appeal from a judgment or an order, any appellate court to which the appeal is taken which is authorized to review such judgment or order may reverse or affirm, wholly or in part, or may modify the judgment or order appealed from, and each interlocutory judgment or intermediate or other order which it is authorized to review, and as to any or all of the parties. It shall thereupon render judgment of affirmance, judgment of reversal and final judgment upon the right of any or all of the parties, or judgment of modification thereon according to law, except where it may be necessary or proper to grant a new trial or hearing, when it may grant a new trial or hearing."

Article VI, Section 7, subdivision (a) of the Constitution of the State of New York which provides:

> "The supreme court shall have general original jurisdiction in law and equity and the appellate jurisdiction herein provided. * * *"

Statutes Involved.

Section 237, subdivision (b), of the New York Domestic Relations Law, which reads as follows:

> "Upon any application to annul or modify an order or judgment for alimony or for custody, visitation, or maintenance of a child, made as in section two hundred thirty-six or section two hundred forty provided, or upon any application by writ of habeas corpus or by petition and order to show cause concerning custody, visitation or maintenance of a child, the court may direct the husband or father to pay such sum or sums of money for the prosecution or the defense of the application or proceeding by the wife or mother as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties. With respect to any such application or proceeding, such direction may only be made in the order or judgment by which the particular application or proceeding is finally determined."

Title 28, U.S.C.A., Section 1651 provides, in part:

> "(a) The Supreme Court . . . may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law . . ."

Statement of the Case.

On March 19, 1979, this Court, in *Childs v. Childs,* No. 77-1653, *supra,* entered the following order:

> "The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Appellate Division, Supreme Court of New York, Second Judicial Department for further consideration in light of *Orr v. Orr,* 440 U. S. (1979). Mr. Justice Stewart dissents."

This Court in *Orr v. Orr,* No. 77-1119, March 5, 1979, 440 U. S. , 99 S. Ct. 1102, in construing the Alabama statutory scheme which imposed alimony obligations on husbands but not on wives determined that statutory scheme to be unconstitutional under the Equal Protection Clause of the Constitution of the United States. Section 237, subdivision (b), of the New York Domestic Relations Law has an identical statutory scheme in that it imposes obligations to pay counsel fees on husbands or fathers, and not on wives or mothers, and in the light of this Court's decision in *Orr v. Orr,* the New York statutory scheme was likewise unconstitutional under the Equal Protection Clause of the Constitution of the United States.

On remand by this Court to the Appellate Division of the Supreme Court of New York, Second Judicial Department, "for further consideration in light of *Orr v. Orr,*" the said Appellate Division in its Decision and Order dated July 11, 1979, appended *infra* at p. 29, ignored both the determination and the Mandate of this Court. The State Appellate Court initially concluded that New York's statutory scheme under Section 237, subdivision (b), of the Domestic Relations Law was unconstitutional as presently drafted, but then blithely proceeded through a process designated as reading the statute expansively to construe said Section 237, subdivision (b), to be constitutional by substituting the word "spouse" for "wife" since the said Appellate Court deemed the statute under this construction process "to authorize counsel fees to either spouse on a gender-neutral, needs-basis only." As a result of its final determination that Section 237, subdivision (b), of the New York Domestic Relations Law was constitutional, the said Appellate Division remitted the entire matter to the New York trial court for a hearing *de novo.* In so construing, the said Appellate Court ignored the most basic rule of construction; it ignored the Doctrine of Separation of Powers and engaged in pure and simple judicial legislation which is clearly impermissible.

The said Appellate Division incorporated in its Decision and Order dated July 11, 1979, appended *infra* at p. 29, not only the question of the unconstitutionality of Section 237, subdivision (b), of the New York Domestic Relations Law which was remanded by this Court, but also an appeal from an order in an enforcement proceeding under Section 244 of the New York Domestic Relations Law which was, and is not, before this Court. The enforcement proceeding under Section 244 of the New York Domestic Relations Law was instituted and continued after the filing of the Petition for a Writ of Certiorari to this Court by your Petitioner on May 19, 1978, since there was no stay issued by this Court or any other Court in effect. Upon the granting of the enforcement order, the Petitioner filed an appropriate appeal to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, and filed and obtained a stay by filing the requisite bond. The said enforcement order was based on the judgment of the Appellate Division of the Supreme Court of the State

of New York, Second Judicial Department, dated December 27, 1977 which was vacated by this Court in *Childs v. Childs,* No. 77-1653, *supra.* Accordingly, since the underlying order on which the enforcement order was based was vacated, the said Appellate Division should have likewise vacated the enforcement order and dismissed the appeal; however, the said Appellate Division chose to combine both the remand from this Court and the appeal in the enforcement proceeding in order to provide it with the opportunity to read the "statute expansively, or in tandem with other statutes" so as to sustain its improper determination of constitutionality of Section 237, subdivision (b), of the New York Domestic Relations Law. *Childs v. Childs,* A. D. 2d , 419 N. Y. S. 2d 533, appended *infra* at p. 29.

The questions considered by the Appellate Division, Second Department in the Decision and Order dated July 11, 1979 concerning the application and constitutionality of Section 238 and 244 of the New York Domestic Relations Law were not before this Court in *Childs v. Childs,* No. 77-1653, *supra,* and are not before this Court in this Petition for a Writ of Mandamus since they are entirely irrelevant to this matter.

On August 16, 1979, the Petitioner herein filed timely a Cross Notice of Appeal appealing as of right to the Court of Appeals of the State of New York from the aforesaid order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, dated July 11, 1979, appended *infra* at p. 29, relying upon the construction of the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States as applied to the said Appellate Court's determination that Section 237, subdivision (b), of the New York Domestic Relations Law was constitutional, in contravention of the mandate of this Court.

By Order of the Court of Appeals of the State of New York dated October 9, 1976, appended *infra* at p. 48, the cross-appeal of the Petitioner herein was dismissed by the Court *sua sponte* "upon the ground that the order appealed from does not finally determine the action within the meaning of the Constitution."

The said Appellate Division disregarded the mandate of this Court by failing to determine Section 237, subdivision (b), of the New York Domestic Relations Law to be unconstitutional and by remitting the matter to the trial court for a hearing *de novo;* thereby putting the Petitioner herein on a judicial merry-go-round of further trial proceedings wherein the fundamental constitutional issue cannot be pursued and determined in the courts of the State of New York.

The New York State courts cannot reverse and remit causes for further state court proceedings irrespective of the Mandate of the Supreme Court of the United States.

Reasons for Granting Writ.

In *Childs v. Childs,* No. 77-1653, appended *infra* at p. 27, this Court vacated the judgment below and remanded the case to "the Appellate Division, Supreme Court of New York, Second Judicial Department, for further consideration in light of *Orr v. Orr,* 440 U. S. (1979)." This Court, in *Orr v. Orr, supra,* held that the Alabama statutory scheme which imposed an obligation on husbands but not on wives to pay alimony

was violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. The relevant Alabama statute which was determined to be unconstitutional in *Orr v. Orr, supra,* provided only that alimony could be paid to the wife out of the husband's estate. There was no authority in the statute for awarding alimony against the wife in favor of the husband.

In holding the Alabama statute unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, where only wives could receive alimony payments from husbands, this Court states in *Orr v. Orr,* 440 U. S. , 99 S. Ct. 1102:

> "Thus, even statutes purportedly designed to compensate for and ameliorate the effects of past discrimination must be carefully tailored. Where, as here, the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender-classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex. And this is doubly so where the choice made by the State appears to redound—if only indirectly—to the benefit of those without need for special solicitude." Pages 1113-14.

On remand by this Court of *Childs v. Childs,* No. 77-1653, appended *infra* at p. 27, the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, and the justices thereof, refused to follow the mandate of this Court issued on April 17, 1979 which compelled consideration of the case in light of the determination of this Court in *Orr v. Orr.* Said Appellate Division initially determined, in light of *Orr v. Orr,* Section 237, subdivision (b), of the New York Domestic

Relations Law to be irrevocably unconstitutional. *Childs v. Childs,* July 11, 1979 A. D. 2d , 419 N. Y. S. 2d 533, appended *infra* at p. 29. The said Appellate Division then proceeded to construe Section 237, subdivision (b), of the New York Domestic Relations Law to be constitutional by an "expansive reading" of the statute, since the said Appellate Court then deemed the statute "to authorize counsel fees on the gender-neutral, needs-basis only." The said Appellate Court held that Section 237, subdivision (b), of the New York Domestic Relations Law can be constitutionally read by substituting the word "spouse" for "wife." In so construing Section 237, subdivision (b), of the New York Domestic Relations Law as being constitutional, the said Appellate Court stated:

> "Such a construction is consistent with the traditional rule that where a statute has been found to violate the equal protection clause, courts will traditionally read into it the improperly excluded class (see, e. g., *Califano v. Westcott,* U. S. (47 U.S.L.W. 4817, 4821) (aid to dependent children benefits); *Califano v. Goldfarb,* 430 U. S. 199 (Social Security Act survivorship benefits); *Weinberger v. Wiesenfeld,* 420 U. S. 636, *supra* (same); *Frontiero v. Richardson,* 411 U. S. 677, *supra* (armed forces fringe benefits); *Levy v. Louisiana,* 391 U. S. 68 (wrongful death actions); *Matter of Passante v. Walden Printing Co.,* 53 A. D. 2d 8, 13 (worker's compensation survivorship benefits)." 419 N. Y. S. 2d at 531, appended *infra,* at p. 29.

In setting forth the so-called "traditional rule" with citations, the Court below is clearly trying to justify its prohibited judicial legislation and is ignoring the mandate of this Court. None of the cited cases stand for the principle that a court may usurp the functions of the legislature or that this Court usurped the functions of the legislature.

Likewise, the Appellate Court below cites Section 238 of the New York Domestic Relations Law, as presently worded, which "presently allows the trial court to require either party to pay the expenses of the other, including counsel fees," and then states that by reading this statute, "in tandem" with Section 237, subdivision (b), Section 237, subdivision (b), can be "constitutionally read as substituting the word 'spouse' for 'wife.'" In fact such substitution does not suffice to make Section 237, subdivision (b), of the New York Domestic Relations Law gender-neutral, even if permissible, for no similar substitution is proposed for the other pertinent words; "husband," "father" and "mother." It is respectfully suggested that this Court note that the status and role of the Petitioner herein in the custody proceedings in the Supreme Court of the State of New York, Westchester County, and all subsequent appeals in this matter, was and is as a father, which is the applicable and operative term in Section 237, subdivision (b), of the New York Domestic Relations Law. No attempt was made by the said New York Appellate Court to say "father" meant "mother," or the converse. This is a prime example of the absurdity of the judicial legislation attempted by the said New York Appellate Court.

Section 238 of the New York Domestic Relations Law to which the Court refers was amended effective July 28, 1978, so as to be gender-free. Prior to that date, awards under Section 238 of the New York Domestic Relations Law could only be made to the wife and against the husband. Thus, the amended Section 238 cannot be utilized to infer legislative intent as referred to by the said Appellate Division, but must be held to indicate that the New York State Legislature did not want to amend the New York Domestic Relations Law, Section 237, subdivision (b), for it explicitly amended only Section 238. If the New York

State Legislature wanted to amend Section 237, subdivision (b), it would have done so and the Appellate Court cannot "deem" the statute to mean what the legislature obviously did not enact.

In attempting to justify the prohibited judicial legislation in *Childs v. Childs,* A. D. 2d , 419 N. Y. S. 2d 533, appended, *infra,* at page 29, the said Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, appears to rely upon the following words of Mr. Justice Brennan in *Orr v. Orr,* 440 U. S. , 99 S. Ct. 1102:

> "In every equal protection attack upon a statute challenged as underinclusive, the State may satisfy the Constitution's commands either by extending the benefits to the previously disfavored class or by denying benefits to both parties (e.g. by repealing the statute as a whole). In this case, if held unconstitutional, the Alabama divorce statutes could be validated by, *inter alia,* amendments which either (1) permit awards to husbands as well as wives, or (2) deny alimony to both parties." Page 1108.

Clearly the State action to which Mr. Justice Brennan refers is the action of the State Legislature in enacting or repealing laws. This is established by his indicating in *Orr v. Orr, supra,* that one of the alternatives whereby the State may satisfy the Constitution's demands is "by denying benefits to both parties (e.g. by repealing the statute as a whole)."

Some commentators have suggested in the post *Orr* period that a State may meet such challenges to the constitutionality of gender-based statutes by judicial construction; however, there is no basis for any presumption that the learned Justice Brennan, in indicating that State ac-

tion may satisfy the Constitution's commands, meant anything other than the appropriate legislative action prescribed by the Constitution of the United States and the Constitution of the State of New York. Mr. Justice William Rehnquist, writing for the majority in *Touche Ross & Co. v. Reddington,* June 18, 1979, No. 78-309, U. S. , 99 S. Ct. 2479, stated precisely the limitations on judicial power, declaring:

> "SIPC and the Trustee contend that the result we reach sanctions injustice. But even if that were the case, the argument is made in the wrong forum, for we are not at liberty to legislate. If there is to be a federal damage remedy under these circumstances, Congress must provide it. '[I]t is not for us to fill any *hiatus* Congress has left in this area.' *Wheeldin v. Wheeler,* 373 U. S. 647, 652, 83 S. Ct. 1441, 1446, 10 L. Ed. 2d 605 (1963). * * *" Pages 2490-1.

It is significant that the said New York Appellate Court in refusing to follow the mandate which this Court issued on April 17, 1979 in *Childs v. Childs,* No. 77-1653, appended, *infra,* at page 27, followed the course taken by the Alabama Court of Civil Appeals on remand from this Court in *Orr v. Orr,* No. 77-1119, 440 U. S. , 99 S. Ct. 1102. The Alabama Court of Civil Appeals, on remand from this Court, in *Orr v. Orr,* dated May 30, 1979, unreported, appended, *infra,* at page 49, sustained the constitutionality of the Alabama alimony statutes by "neutrally extending alimony rights to needy husbands as well as wives." In so doing the Alabama Court of Civil Appeals baldly stated:

> "As a matter of predominant legislative purpose then, we are not prepared to eliminate the current statutory benefits available to needy females inasmuch as we are of the opinion that the legislature would not do so." *Id.* appended, *infra,* page 49.

And almost apologetically the Alabama Court of Civil Appeals explained its act of judicial legislation, as follows:

> "We would be remiss in not commenting that we take the above action reluctantly. It has been the policy of this Court not to encroach on the legislature's function. We adhere to that policy. However, in view of the magnitude of the problem created by the action of the United States Supreme Court, we are compelled to apply the principle of law which we do in this instance. Unless we take appropriate measures, Alabama will be without an alimony statute. The legislature has not had ample opportunity to respond to this void: it therefore becomes our duty to fill that void by the application of appropriate legal principles." *Id.* appended, *infra,* at page 49.

Both the New York court and the Alabama court have ignored the respective mandates issued by this Court. Both courts have violated the Doctrine of Separation of Powers by engaging in prohibited judicial legislation which clearly is impermissible.

Section 237, subdivision (b), of the New York Domestic Relations Law as presently enacted falls within the proscription of *Orr v. Orr,* No. 77-1119, 440 U. S. , 99 S. Ct. 1102, and is irrevocably unconstitutional under the Constitution of the United States and the Constitution of the State of New York. Any change in this statutory scheme contained in the New York Domestic Relations Law must come from the Legislature of the State of New York. Article III, Section 1 of the Constitution of the State of New York; Article I, Section 1 of the Constitution of the United States. *Leffler v. Leffler,* 50 A. D. 2d 93, 95, 376 N. Y. S. 2d 176 (1975), affirmed 40 N. Y. 2d 1036, 391 N. Y. S. 2d 855 (1976); *Northrup v. Northrup,* 43 N. Y. 2d 566, 572, 402 N. Y. 2d 997, 999 (1978); *Erkenbach v. Erkenbach,* 96 N. Y. 456, 465 (1883).

The Courts of the State of New York may adjudicate, they cannot legislate. Article III, Section 1 and Article VI, Sections 5(a) and 7(a) of the Constitution of the State of New York; Article I, Section 1 and Article III, Section 1 of the Constitution of the United States; *U. S. v. Carolene Products Co.,* 304 U. S. 144, 151-4, 58 S. Ct. 778, 783-4 (1938); *People v. Bielecki,* 56 Misc. 2d 730, 733, 291 N. Y. S. 2d 217, 219 (1968); *People v. Friedman,* 302 N. Y. 75, 79, 96 N. E. 2d 184, 185-6 (1950); *People v. Kupprat,* 6 N. Y. 2d 88, 90, 188 N. Y. S. 2d 483, 485 (1959).

The State legislature has all the law making powers inherent in its sovereignty, except as curtailed by State or Federal Constitutions expressly or by necessary implications, and where the language used in a statute is without any ambiguity, indefiniteness or obscurity, the statute must be enforced by the courts exactly as it is written; *Trade Accessories v. Bellet,* 184 Misc. 962, 965-6, 55 N. Y. S. 2d 361, 364-5 (1945), appeal dismissed 295 N. Y. 763, 66 N. E. 2d 127. For the Court below to engage in judicial legislation by reading "wife" to mean "spouse," and "husband" to mean "spouse," is violative of the Doctrine of Separation of Powers, under which the legislature makes the laws and the Courts construe the laws and adjudge as to the rights of persons thereunder. *People v. Morton,* 156 N. Y. 136, 144, 50 N. E. 791 (1898). Each of the three branches of government is "separate, independent and co-equal" possessing inherent powers to protect its powers. It is a fundamental principle of constitutional law that one branch of government may not encroach on the jurisdiction of another, nor impede another in carrying out its duties and responsibilities. *Ascione v. City of New York,* 84 Misc. 2d 414, 419, 377 N. Y. S. 2d 599 (1975) modified, *Blyn v. Bartlett,* 379 N. Y. S. 2d 616, 50 A. D. 2d 442, affirmed, 384 N. Y. S. 2d 99, 39 N. Y. 2d 349.

A Court may not make, but may only interpret the policy of the State, which is either expressed in or implied from its constitution, legislative enactments and common law, and does not under any circumstances formulate public policy; it may not fill a vacuum which may exist in the law by a legislative determination in the guise of a judicial ruling. *Kates v. Lefkowitz,* 28 Misc. 2d 210, 211 & 217, 216 N. Y. S. 2d 1014, 1016 & 1021 (1961); *Kuhn v. Curran,* 184 Misc. 788, 56 N. Y. S. 2d 737 (1945). All Courts are bound by the applicable provisions of the Federal and State Constitutions. *People v. Scher,* 76 Misc. 2d 71, 79, 349 N. Y. S. 2d 902, 911 (1973).

The Appellate Division in its Decision and Order dated July 11, 1979 has endeavored to justify its "construction" of Section 237, subdivision (b), of the New York Domestic Relations Law as being constitutional by indicating that without such a reading of the statute, inequitable circumstances would occur which were "totally unforeseen by the legislature"; *Childs v. Childs,* A. D. 2d , 419 N. Y. S. 2d 533, appended, *infra,* at page 29.

Clearly, a Court may not substitute itself for the legislature merely because the legislature has failed to act. *Clasen Management Corp. v. Temporary State Housing Rent Commission,* 29 Misc. 2d 258, 260, 217 N. Y. S. 2d 287, 290 (1961). The Court may not legislate under the guise of interpretation of a statute; *Bright Homes, Inc., v. Wright,* 8 N. Y. 2d 157, 162, 203 N. Y. S. 2d 67, 70 (1960). Mere expediency cannot transfer the legislative powers to the Court, even though a vacuum may exist in the statutory scheme. *People v. System Properties, Inc.,* 2 N. Y. 2d 330, 345, 160 N. Y. S. 2d 859, 868 (1957); *Kessel v. D'Amato,* 97 Misc. 2d 675, 412 N. Y. S. 2d 303, 310 (1979).

The Court below construed the word "wife" in Section 237(b) of the New York Domestic Relations Law to mean "spouse." Webster's Third International Dictionary of the English Language, Unabridged (1976), gives the following definitions:

Husband: A married man.

Wife: A married woman.

Spouse: A man or woman joined in wedlock: married person.

Father: A man who has begotten a child: a male parent.

Mother: A woman who has given birth to a child: a female parent.

There is no ambiguity in these words. They are explicit and set forth precisely an intended sexual differentiation. To say that "husband" can mean "spouse" or "wife" can mean "spouse" in every statutory context is illogical and illiterate. The syllogism is absurd, for a "husband" cannot be a "married man or married woman"; nor can a "wife" be a "marrried man or married woman." It refutes common sense. In construing statutes the commonly accepted meaning of the word or words must be used. *Rathbun v. United States,* 355 U. S. 109, 78 S. Ct. 161 (1957). The learned Justice Oliver Wendell Holmes states the difference clearly in his dissent in *Adkins v. Children's Hospital,* 261 U. S. 525 (1923) saying:

> "It will need more than the 19th Amendment to convince me that there are no differences between men and women . . . ." Page 570.

The attempted transmutation of "husband" into "spouse" meaning either husband or wife, by the New York Appellate Court, is a glaring example of judicial fiat. "It's like this: When your Majesty says, 'Let a thing be done'—practically, it is done—because your Majesty's will is law." Gilbert and Sullivan, The Mikado, Act II (1885).

In *Orr v. Orr,* No. 77-1119, *supra,* this Court, if it determined that it possessed the power and authority, could have construed "husband" to mean "husband or wife," or "spouse," and "wife" to mean "wife or husband," or "spouse," but it did not. For this Court well knew that it possessed no power to engage in legislative acts. However, the New York Appellate Court ignored both the mandate issued by this Court in *Childs v. Childs,* No. 77-1653, appended, *infra,* at page 27, and the express limitation on its powers to legislate contained in the Constitution of the United States and the Constitution of the State of New York.

There is no ambiguity in the meaning of Section 237, subdivision (b), of the New York Domestic Relations Law. The New York Appellate Court merely ignored the basic rules of construction. It ignored the elementary rule of *"Inclusio unius est exclusio alterius."* If the statute states "wife," it certainly excludes "husband," and if it states "husband," it likewise excludes "wife." If it includes "father," it excludes "mother," and conversely. It refused to recognize that no ambiguity exists in the meaning of the words "husband" or "father," or "wife" or "mother."

Where statutory law was fixed, the Court cannot disregard that law as written and cannot construe or appraise legislative judgment or enactment where the language of the statute is not ambiguous. *Bright Homes,*

Inc. v. Wright, supra; Mertz v. Mertz, 271 N. Y. 466, 471, 3 N. E. 2d 597 (1936); *People v. Caswell-Massey Company,* 7 A. D. 2d 727, 180 N. Y. S. 2d 611 (1959). The New York Courts cannot review the acts of the legislature and substitute their judgment for that of the legislature. *People v. System Properties, Inc., supra; People v. Billi,* 90 Misc. 2d 568, 570-573, 395 N. Y. S. 2d 353, 355-357 (1977). The Courts cannot, through construction, enact an intent which the legislature failed to express by reading into a statute words which were not there. *People v. Stuyvesant Insurance Co.,* 98 Misc. 2d 210, 413 N. Y. S. 2d 843, 848 (1979); *Matter of Palmer v. Spaulding,* 299 N. Y. 368, 372, 87 N. E. 2d 301, 302 (1949). Words of ordinary import should be given their plain, ordinary and usual meaning. *Bright Homes, Inc. v. Wright, supra; Matter of Palmer v. Spaulding, supra.*

The Court below by its construction of Section 237, subdivision (b), of the New York Domestic Relations Law endeavored to construe the plain and unambiguous meaning of that statute. The Court, in so doing, usurped the functions of the State legislature and, under the guise of construction, endeavored to rewrite the statute to make it something entirely different from what its wording plainly indicated. Such action by the Court is clearly prohibited judicial legislation. *Matter of Palmer v. Spaulding, supra; Tormey v. Laguardia,* 278 N. Y. 450, 17 N. E. 2d 126 (1938), motion denied, 279 N. Y. 780, 18 N. E. 2d 864. Under the Doctrine of Separation of Powers, courts may not legislate or expand statutory terms to extend legislation. *In re Adoption of Malpica-Orsini,* 36 N. Y. 2d 568, 37 N. Y. S. 2d 511 (1975), appeal dismissed; *Orsini v. Blasi,* 96 S. Ct. 765, 423 U. S. 1042 (1976).

In *Caban v. Mohammed,* No. 77-6431, 440 U. S. , 99 S. Ct. 1760 (April 24, 1979), this Court held Section 111, subdivision 1(c), of the New York Domestic Relations Law to be unconstitutional, in that the Equal Protection Clause of the Fourteenth Amendment was violated by the sex-based distinction between unmarried mothers and unmarried fathers contained therein. The challenged provision of the New York Domestic Relations Law permitted an unwed mother, but not an unwed father, to block adoption of their illegitimate child. This Court did not endeavor to construe "mother," as used in the challenged section, to mean "mother or father," but read the statute as written and found it to constitute gender-based discrimination.

This Court could have issued a similar decree in *Childs v. Childs,* No. 77-1653, *supra,* but chose to follow the practice of remanding the matter for further proceedings and consideration by the New York Appellate Court. This Court may, if it so wishes, on this Petition for Writ of Mandamus, formulate its own decree, since the New York Appellate Court has refused to conform to this Court's mandate. *Martin v. Hunter's Lessee,* 1 Wheat. (14 U. S.) 304, 4 L. Ed. 97 (1816); *NAACP v. State of Alabama ex rel. Flowers,* 377 U. S. 288, 84 S. Ct. 1302 (1964).

Without doubt, this Court has the jurisdiction and the power to give effect to its own judgment and compel full and correct compliance by a state court with its mandate where the state court has declined or refused to carry out that mandate. The Constitution and laws of the United States are as much a part of the law of every state as its own local laws and Constitution. The judges of a state must pronounce the law applicable to the case in judgment, which must be decided not merely according

to the laws or Constitution of the state, but according to the law and Constitution of the United States which is the supreme law of the land. *Martin v. Hunter's Lessee, supra.*

This Court has permitted a Petition for a Writ of Mandamus to be filed against a state court and issued a rule to show cause why mandamus should not issue. *Ex parte State of Texas,* 315 U. S. 8, 62 S. Ct. 418 (1942). In two cases this Court has granted Petitioner's motion for leave to file a Petition for a Writ of Mandamus to require the state court to conform its decision to the mandate of this Court, but did not issue the writ on the assumption that the state court would conform to the decision made in the mandamus proceeding. *Bucolo v. Adkins,* 424 U. S. 641, 96 S. Ct. 1086 (1976); *Deen v. Hickman,* 358 U. S. 57, 79 S. Ct. 1 (1958).

If this Court fails to compel state courts to comply with its mandates by appropriate writs, then the decision of the Supreme Court of the United States, in cases originating in state courts, will be enforceable only to the extent that state courts are willing to enforce them. If the proceedings of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, are not corrected to conform to the judgment, opinion and mandate of this Court, then judges of state courts need not be concerned with that part of Article VI of the Constitution of the United States which provides that "This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Conclusion.

The Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, and the aforesaid justices thereof, have violated the mandate of this Court issued on April 17, 1979 in *Childs v. Childs,* No. 77-1653, by engaging in prohibited judicial legislation on remand by construing Section 237, subdivision (b), of the New York Domestic Relations Law to be constitutional and remitting the matter to the trial court for a hearing *de novo.* The said New York Appellate Court upon receiving the aforesaid mandate of this Court has sought to evade it and to render it ineffective, and in doing so has violated the Doctrine of Separation of Powers.

WHEREFORE, Petitioner prays:

1. That a Writ of Mandamus issue from this Court directing the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, Milton Mollen, Presiding Justice, and Frank D. O'Connor, Leon D. Lazer, Frank A. Gulotta and Guy J. Mangano, Justices of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, to show cause on a day fixed by this Court why a Mandamus should not be issued by this Court directing the said Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, and the said Justices thereof, to comply with the mandate of this Court issued on April 17, 1979 in *Childs v. Childs,* No. 77-1653, and directing the said Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, and the afore-

said Justices thereof, to vacate its Decision and Order dated July 11, 1979 and to enter an order in conformity with the aforesaid mandate of this Court.

2. That Petitioner have such additional relief and process as may be necessary and appropriate in the premises.

Respectfully submitted,

THEODORE Q. CHILDS,
Counsel for Petitioner (*Pro Se*),
150 Broadway,
New York, N. Y. 10038

APPENDIX.

Opinion and Order of the Supreme Court of the United States in *Childs v. Childs*, No. 77-1653, March 19, 1979.

No. 77-1653. Theodore Q. Childs, petitioner, v. Lucy Gant Childs.

March 19, 1979. On petition for writ of certiorari to the Appellate Division of the Supreme Court of New York, Second Judicial Department. Petition for writ of certiorari granted, judgment vacated and case remanded to the Appellate Division of the Supreme Court of New York, Second Judicial Department, for further consideration in light of *Orr v. Orr,* 440 U. S. , 59 L. Ed. 2d 306, 99 S. Ct. (1979). Mr. Justice Stewart dissents.

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

Washington, D. C. 20543

March 19, 1979

Theodore Q. Childs
150 Broadway
New York, NY 10038

Re: Theodore Q. Childs
v. Lucy Gant Childs
No. 77-1653

Dear Mr. Childs:

The Court today entered the following order in the above-entitled case:

"The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Appellate Division, Supreme Court of New York, Second Judicial Dept. for further consideration in light of *Orr v. Orr,* 440 U. S. (1979). Mr. Justice Stewart dissents."

Very truly yours,

MICHAEL RODAK, JR.
Clerk

th

Decision and Order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, dated July 11, 1979, A. D. 2d , 419 N. Y. S. 2d 533.

July 11, 1979

SUPREME COURT,

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT.

O'Connor, J.P., Lazer, Gulotta and Mangano, JJ.

LUCY GANT CHILDS,

Respondent,

against

THEODORE Q. CHILDS,

Appellant.

APPEALS from (1) so much of an order of the Supreme Court at Special Term (James R. Caruso, J.), dated December 30, 1976 and entered in Westchester County, as awarded plaintiff a counsel fee of $12,000, plus disbursements, and (2) a further order of the same court (Anthony J. Ferraro, J.), dated July 11, 1978, which, *inter alia,* granted plaintiff's application for a money judgment for arrears in the payment of counsel fees. (By order dated March 19, 1979, the Supreme Court of the United States "vacated" the order of this court which had modified the order dated December 30, 1976 [60 A. D. 2d 638] and remanded the case to this court for further consideration in light of *Orr v. Orr,* 440 U. S. [99 S. Ct. 1102].)

John J. Von Der Lieth, New York, N. Y., for appellant and appellant *pro se.*

Lans Feinberg & Cohen, New York, N. Y. (Deborah E. Lans and Robert Stephan Cohen of counsel), for respondent.

Robert Abrams, Attorney-General, New York, N. Y. (Robert J. Schack and George D. Zuckerman of counsel), appearing pursuant to Executive Law, §71.

O'Connor, J. P.:

We are called upon by the Supreme Court of the United States to review a previous decision of this court in light of *Orr v. Orr* (440 U. S. [99 S. Ct. 1102]) (see *Childs v. Childs,* 60 A. D. 2d 639, mot. to dismiss app. granted 43 N. Y. 2d 946, revd. 440 U. S. [99 S. Ct. 1488]). This in turn requires us to test the constitutionality of section 237 of the Domestic Relations Law under a post-*Orr* light. We hold that the statute is constitutional insofar as it authorizes the trial court to award counsel fees to either party on a gender-neutral, needs-only basis. We further hold that this construction of the Domestic Relations Law shall be prospective only to proceedings and applications pending on March 5, 1979, the date of the *Orr* decision.

I

The facts, other than conflicting allegations of financial worth, are essentially not in dispute. The parties were married in 1955 and divorced in July, 1974 pursuant to a judgment of the Supreme Court, Westchester County. Four children were born during the marriage: three sons, presently 23, 12 and 10 years old, respectively; and one

daughter, presently 21 years old. By stipulation, the two older children remained with the defendant father, while the two younger sons remained in the plaintiff mother's custody in the marital home in Scarsdale, New York, subject to the defendant's visitation rights. The underlying proceeding which triggered the present controversy was a contested postdivorce custody proceeding commenced by the defendant in the Supreme Court, Westchester County. It appears that in December, 1975, the plaintiff mother, without any notice to or consent of the defendant father, vacated the marital residence with the two youngest children and moved to Chapel Hill, North Carolina. Since this had the effect of frustrating the defendant's visitation rights, he immediately moved to modify the judgment of divorce so as to obtain custody of these two children. There followed a plenary hearing lasting some 20 days at which numerous witnesses, both lay and medical, testified. An application was also made by the plaintiff, during the proceeding, for counsel fees. The defendant husband, however, did not cross-apply for counsel fees. While the defendant ultimately succeeded in obtaining custody of the two youngest boys, the trial court (Caruso, J.), in an order dated December 30, 1976, nevertheless awarded the plaintiff counsel fees of $12,000 and disbursements of $1,500.

The defendant thereupon appealed to this court, arguing for the first time that section 237 of the Domestic Relations Law was unconstitutional as violative of the equal protection clause (citing, *inter alia, Frontiero v. Richardson,* 411 U. S. 677 and *Reed v. Reed,* 404 U. S. 71). This court, in a decision dated December 27, 1977 (60 A. D. 2d 639), refused to reach the constitutional question upon the ground that "[a]ppellant, having failed to request a counsel fee, lacks the requisite standing to challenge the constitutionality of the statute (see 8 N. Y. Jur, Constitutional Law, §50)." At the same time, however, this

court afforded the defendant some relief by reducing the award of counsel fees to $5,000, plus disbursements.

Aggrieved, the defendant appealed to the Court of Appeals. On February 22, 1978 that court dismissed the appeal on the ground, *inter alia*, that "no substantial constitutional question is directly involved" (43 N. Y. 2d 946, 947). Still aggrieved, the defendant filed a petition for certiorari to the Supreme Court of the United States.

While the defendant was pursuing his appellate review channels, the plaintiff was proceeding with enforcement remedies. Upon the defendant's failure to pay the reduced award, the plaintiff moved in May, 1978, pursuant to section 244 of the Domestic Relations Law, for the entry of a judgment for $6,500 representing arrears of counsel fees plus disbursements. In opposition, the defendant sought to relitigate the propriety of the award of counsel fees previously reviewed by this court; specifically, he stated that the award was unjust because his wife had assets of $464,000 while he earned only $19,000 per year and had a net debt of some $50,000. The defendant also requested a stay of entry of a judgment pending further appeals. The court (Ferraro, J.), by an order dated July 11, 1978, granted the plaintiff's application for a judgment of $6,500 while denying the defendant's application for a stay.

Meanwhile, the defendant's appeal to the Supreme Court of the United States on the underlying order awarding counsel fees (i.e., 60 A. D. 2d 639, mot. to dismiss app. granted 43 N. Y. 2d 946, *supra*), was slowly winding its way through channels. On March 5, 1979 the celebrated case of *Orr v. Orr* (440 U. S. [99 S. Ct. 1102]) was decided, striking down an Alabama statutory scheme similar to New York's, as violative of the equal protection clause of the Constitution. On March 19, 1979 the Supreme Court of the United States granted the *Childs* petition for writ of certiorari, vacated the previous order of this court and

"remanded [the case] to the Appellate Division of the Supreme Court of New York, Second Judicial Department, for further consideration in light of *Orr v. Orr*, 440 U. S. " (*Childs v. Childs*, 440 U. S. [99 S. Ct. 1488], *supra*). The State Attorney-General has been given permission to intervene (see Executive Law, §71) and, at this time, both the appeal from the order granting a judgment of $6,500, and the remand from the Supreme Court of the United States on the constitutionality of section 237 are before this court.

II

Analysis must commence with a statement of the law as it presently exists:

> "§237. Counsel fees and expenses
>
> "(a) In any action or proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to declare the validity or nullity of a judgment of divorce rendered against the wife who was the defendant in any action outside the State of New York and did not appear therein where the wife asserts the nullity of such foreign judgment, or (5) by a wife to enjoin the prosecution in any other jurisdiction of an action for a divorce, or (6) upon any application to annul or modify an order for counsel fees and expenses made pursuant to this subdivision provided, *the court may direct the husband,* or where an action for annulment is maintained after the death of the husband may direct the person or persons maintaining the action, *to pay such sum or sums of money directly to the wife's attorney to enable the wife to carry on or defend the action or proceed-*

ing as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties. Such direction must be made in the final judgment in such action or proceeding, or by one or more orders from time to time before final judgment, or by both such order or orders and the final judgment. Upon application of the husband or the wife or the person or persons maintaining an action for annulment after the death of the husband, upon such notice to the other party and given in such manner as the court shall direct, the court may, in or before final judgment, annul or modify any such direction. Subject to the provisions of section two hundred forty-four of the domestic relations law the authority granted by the preceding sentence shall extend to unpaid sums or installments accrued prior to the application as well as to sums or installments to become due thereafter. Any applications for counsel fees and expenses may be maintained by the attorney for the wife in his own name in the same proceeding.

"(b) *Upon any application to annul or modify an order or judgment* for alimony or for custody, visitation, or maintenance of a child, made as in section two hundred thirty-six or section two hundred forty provided, or upon any application by writ of habeas corpus or by petition and order to show cause concerning custody, visitation or maintenance of a child, *the court may direct the husband or father to pay such sum or sums of money for the prosecution or the defense of the application or proceeding by the wife or mother as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties.* With respect to any such application or

proceeding, such direction may only be made in the order or judgment by which the particular application or proceeding is finally determined. Any applications for counsel fees and expenses may be maintained by the attorney for the wife in counsel's own name in the same proceeding" (emphasis supplied).

"§238. Expenses in enforcement proceedings

"In any action or proceeding to compel the payment of any sum of money required to be paid by a judgment or order entered in an action for divorce, separation, annulment or declaration of nullity of a void marriage, or in any proceeding pursuant to section two hundred forty-three, two hundred forty-four, two hundred forty-five, or two hundred forty-six, the court may in its discretion require either party to pay the expenses of the other in bringing, carrying on, or defending such action or proceeding. *In any such action or proceeding, applications for counsel fees and expenses may be maintained* by the attorney for the respective parties in counsel's own name and in counsel's own behalf" (emphasis supplied).

"§244. Enforcement by execution of judgment or order in action for divorce, separation or annulment

"Where the husband in an action for divorce, separation or annulment, or declaration of nullity of a void marriage, or a person other than the husband when an action for an annulment is maintained after the death of the husband, *makes default in paying any sum of money as required by the judgment or order directing the payment thereof, the court in its discretion may make an order directing the entry of judgment for the amount of such arrears, or for such*

part thereof as justice requires having a regard to the circumstances of the respective parties, together with ten dollars costs and disbursements. The application for such order shall be upon such notice to the husband or other person as the court may direct. Such judgment may be enforced by execution or in any other manner provided by law for the collection of money judgments. The relief herein provided for is in addition to any and every other remedy, including, but not limited to the remedy provided pursuant to the provisions of section forty-nine-b of the personal property law, to which the wife may be entitled under the law; provided that when a judgment for such arrears or any part thereof shall have been entered pursuant to this section, such judgment shall thereafter not be subject to modification under the discretionary power granted by this section; and after the entry of such judgment the judgment creditor shall not hereafter be entitled to collect by any form of remedy any greater portion of such arrears than that represented by the judgment so entered" (emphasis supplied).

The focus of our inquiry is, of course, the Supreme Court's decision in *Orr v. Orr (supra)* and its impact on the foregoing laws. The Alabama statutory scheme construed was quite similar to that of New York's inasmuch as, by statute, Alabama likewise permitted alimony to be granted only to wives, never to husbands (see *Orr v. Orr, supra,* p. 1107, n. 1, citing, Ala. Code, tit. 30, §30-2-51, *et seq.*). As far as we are concerned, *Orr* is noteworthy for its analysis of standing in addition to its examination of the underlying equal protection considerations. The threshold issue of standing is relevant here because, in the December, 1977 order, this court disposed of the constitutional attack on standing grounds, i.e., the "[a]ppellant, having failed to request a counsel fee, lacks the

requisite standing to challenge the constitutionality of the statute" (60 A. D. 2d 639, *supra*). In *Orr* it was urged that the defendant lacked standing because he "made no claim that he was entitled to an award of alimony from Mrs. Orr, but only that he should not be required to pay alimony if similarly situated wives could not be ordered to pay. It is therefore possible that his success here will not ultimately bring him relief from the judgment outstanding against him" (*Orr v. Orr,* 99 S. Ct. at pp. 1107-1108, *supra*). Mr. Justice Brennan, speaking for a six-member majority, however, failed to find this argument persuasive (*supra,* p. 1108):

> "In every equal protection attack upon a statute challenged as underinclusive, the State may satisfy the Constitution's commands either by extending benefits to the previously disfavored class or by denying benefits to both parties * * * In this case, if held unconstitutional, the Alabama divorce statutes could be validated by, *inter alia,* amendments which either (1) permit awards to husbands as well as wives, or (2) deny alimony to both parties * * * [I]f * * * the State takes the second course and denies alimony to both spouses, it is Mr. Orr and not the hypothetical plaintiff who would benefit * * *
>
> "There is no question but that Mr. Orr bears a burden he would not bear were he female * * *. The burden alone is sufficient to establish standing. Our resolution of a statute's constitutionality often does 'not finally resolve the controversy between th[e] appellant and th[e] appellee,' *Stanton v. Stanton* [421 U. S. 17]. We do not deny standing simply because the 'appellant, although prevailing here on the federal constitutional issue, may or may not ultimately win [his] lawsuit.' *Id.,* at 18."

Similarly, in the instant case, the fact that the defendant may not ultimately succeed in obtaining the sought-after relief when tested against purely objective economic criteria is legally insignificant from the point of view of standing. Nor may the defendant's failure to request a counsel fee in the original custody proceeding be considered any longer a fatal impediment to standing, despite this court's earlier conclusion to that effect. The gravity of the issue being beyond doubt in light of *Orr*, this court may reconsider the question upon remand despite the failure to request such an award or even raise the issue at trial (cf. *Matter of Niagara Wheatfield Administrators Assn.* [*Niagara Wheatfield Cent. School Dist.*], 44 N. Y. 2d 68, 72). In any event, were we to affirm the order upon remand from the Supreme Court upon the ground that the defendant's failure to raise any equal protection infirmity before the trial court constituted an adequate State ground for such affirmance (see *Orr v. Orr*, 99 S. Ct. at p. 1109, *supra*; cf. *Henry v. Mississippi*, 379 U. S. 443, 446), the defendant would still possess the requisite standing to attack the constitutionality of the statutory scheme. This follows because the defendant affirmatively requested counsel fees during the *subsequent* enforcement proceeding in May, 1978. Consequently, at no time has appellate scrutiny of sections 238 and 244 of the Domestic Relations Law been impaired.

Having disposed of the threshold procedural objections, the Supreme Court turned its attention to the equal protection problem itself. The court held that the Alabama statutory scheme of imposing alimony obligations on husbands but not wives violated the equal protection clause of the Fourteenth Amendment. "'To withstand scrutiny' under the equal protection clause, '"classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives"'" (*Orr v. Orr*, 99 S. Ct. at p. 1111, citing *Califano v. Webster*, 430 U. S. 313, 316-317). Alimony is, in principle, a valid governmental objective because it seeks to assist needy spouses. However, no statutory scheme may be upheld on the basis of the State's preference for an allocation of family responsibility under which the wife plays merely a submissive, dependent role. "[T]he 'old notion' that 'generally it is the man's primary responsibility to provide a home and its essentials,' can no longer justify a statute that discriminates on the basis of gender. 'No longer is the female destined solely for the home and the rearing of the family, and only the male for the market place and the world of ideas'" (*Orr v. Orr*, 99 S. Ct. at p. 1112, citing *Stanton v. Stanton*, 421 U. S. 7, 10, 14-15; see, also, *Craig v. Boren*, 429 U. S. 190, 198). Putting it another way, while providing for alimony is a valid legislative action, *gender* could no longer provide an accurate index of need, or an "'accurate proxy'" (*Orr v. Orr*, 99 S. Ct. at 112, citing *Craig v. Boren, supra*, p. 204; see, also, *Reed v. Reed*, 404 U. S. 71, 76, *supra*). Since the parties' finances were *already* required to be considered by the Alabama statutory scheme before any trial court determination (*Orr v. Orr, supra*, p. 1113), it logically followed that any "'gender-based distinction is gratuitous'" (*id., citing Weinberger v. Wiesenfeld*, 420 U. S. 636, 653). Accordingly, the Supreme Court concluded that any classification based purely on gender was irrational from an equal protection point of view, and the underlying statutory scheme unconstitutional.

III.

Having examined the constitutional underpinnings of *Orr*, there can be no doubt that sections 237 and 244 of the Domestic Relations Law, with their present gender predicates, must likewise fall under the prohibition of

equal protection principles. Section 238 of the Domestic Relations Law, as recently amended to provide for counsel fees to either spouse, is, however, constitutionally permissible. It matters not that our inquiry is addressed to statutes which authorize counsel fees to wives only, and not alimony obligations. Like the Alabama statute which was stricken, section 237 of the Domestic Relations Law is designed to assist needy wives and guarantee their ability to bring matrimonial actions unimpeded by monetary obstacles; on its face, the statute is specifically conceived "to enable the wife to carry on or defend the action or proceeding" (Domestic Relations Law, §237, subd. [a]; see *Emmer v. Emmer,* A. D. 2d [2nd Dept., dec. April 16, 1979], citing *Martin v. Martin,* 28 A. D. 2d 897; *Zang v. Zang,* 63 A. D. 2d 561, citing *Kann v. Kann,* 38 A. D. 2d 545; *LaPorte v. LaPorte,* 60 A. D. 2d 966 [Appeal No. 2]; *Ross v. Ross,* 47 A. D. 2d 866; *Winter v. Winter,* 39 A. D. 2d 69, 71-72, affd. 31 N. Y. 2d 983; see, also, 11B Zett-Edmonds-Schwartz, N. Y. Civ. Prac., §38.06[1], p. 38.65). Without repeating the equal protection argument verbatim, *Orr* makes it readily apparent that New York's statutory scheme of granting counsel fees purely as a function of gender is irrational and cannot stand. As the Court of Appeals observed with respect to the analogous setting of a section of the Family Court Act which subjected girls to a Person in Need of Supervision (PINS) adjudication until the age of 18, while simultaneously affording immunity to boys from such liability after the age of 16, "since there is no justification for the age-sex distinction so much of section 712 (subd. [b]) of the Family Court Act as encompasses females between the ages of 16 and 18 must be stricken as unconstitutional" (*Matter of Patricia A.,* 31 N. Y. 2d 83, 89; see, also, *Seidenberg v. McSorley's Old Ale House, Inc.,* 308 F. Supp. 1253, 1259-1260). Since New York's statutory scheme presently requires the trial court to

take into consideration the respective finances of the parties before making a determination of counsel fees (see Domestic Relations Law, §§ 237, 250, cf. *Garrel v. Garrel,* 59 A. D. 2d 885), it logically follows that "'the gender-based distinction is gratuitous'" (*Orr v. Orr,* 99 S. Ct. at p. 1113, *supra,* citing *Weinberger v. Wiesenfeld,* 420 U. S. 636, 653, *supra*); that is to say, the purpose of the legislation will be satisfied based purely on objective economic criteria and without resort to any impermissible gender classification. The conclusion that New York's statutory scheme is unconstitutional insofar as it is predicated on gender is not novel. In *Thaler v. Thaler* (89 Misc. 2d 315, 319-325, revd on other grounds 58 A. D. 2d 890), Mr. Justice Harnett reasoned that sections 236 and 237 of the Domestic Relations Law were violative of the equal protection clause based upon an analysis quite similar to that of *Orr.* Other trial courts have reached similar conclusions in the wake of *Orr*[1]. It is important to note, however, despite the patent invalidity of sections 237 and 244, that section 238 of the Domestic Relations Law, as amended in 1978, is perfectly constitutional within the strictures of *Orr.* This follows because the statute presently authorizes the trial court to "require *either party to pay the expenses of the other* in bringing, carrying on, or defending such" an enforcement proceeding, including specifically counsel fees (emphasis added).

IV.

Although sections 237 and 244 of the Domestic Relations Law as presently drafted fall within the proscription of *Orr,* yet it does not necessarily follow that they

[1]See *Laka v. Laka,* N.Y.L.J., March 20, 1979, p. 12, col. 2; *Levy v. Levy,* N.Y.L.J., April 19, 1979, p. 13, col. 5; *Robson v. Robson,* N.Y.L.J., March 27, 1979, p. 6, col. 6; cf. *Matter of Roth,* N.Y.L.J., March 27, 1979, p. 12, col. 5.

must be deemed irrevocably unconstitutional and annulled. We are cognizant of the argument that, counsel fees being a creature of statute and unknown to the common law, such an infirmity as discerned here leaves this court powerless to resurrect the authority to award counsel fees absent new and constitutional legislative action (see *Lambert v. Lambert,* 45 A. D. 2d 715, citing *Silbert v. Silbert,* 22 A. D. 2d 893, affd. 16 N. Y. 2d 564 and *Blaine v. Blaine,* 20 A. D. 2d 903; cf. *Sharrock v. Dell Buick-Cadillac,* 45 N. Y. 2d 152, 166-167).[2] But an appellate court has an obligation to pursue every reasonable path of reconciliation of the challenged statute consonant with the Constitution, rather than setting it aside. In this regard, it is commonly said that every presumption in favor of the statute will be indulged, every effort made to construe ambiguous language so as not to conflict with fundamental law (see, e. g., *Marcus Assoc. v. Town of Huntington,* 45 N. Y. 2d 501, 505, citing *Lighthouse Shores v. Town of Islip,* 41 N. Y. 2d 7, 11; *Matter of Carter v. Carter,* 58 A. D. 2d 438, 445-446 [opn. by Shapiro, J.], citing *Hirson v. United States Corp.,* 263 App. Div. 646, 650, affd. 289 N. Y. 564; see, also, McKinney's Cons. Laws of N. Y., Book 1, Statutes, §150, subd. c). And while courts traditionally refrain from construing a challenged statute in such a way so as to "expand" or add to the language, as opposed to merely excising from it (see *Matter of Malpica-Orsini,* 36 N. Y. 2d 568, 571, app. dsmd. 423 U. S. 1042), nevertheless, under appropriate circumstances, a court may read a statute expansively, or in tandem with other statutes, so as to prevent serious damage to overriding public policy (see *Welsh v. United States,* 398 U. S. 333, 355-356 [Harlan, J., concurring]). Without such an expansive reading in the instant case,

[2]For cases where this argument was made, see *Levy v. Levy,* N.Y.L.J., April 19, 1979, p. 13, col. 5; *Robson v. Robson,* N.Y.L.J., March 27, 1979, p. 6, col. 6.

the orderly processes by which indigent spouses seek legal recourse would come to a halt producing extremely inequitable circumstances, totally unforeseen by the Legislature. As Mr. Justice Harnett pointed out in *Thaler* (89 Misc. 2d 315, 328, *supra*), with respect to the possible elimination of alimony: "Total elimination of alimony would produce a much greater shock to the legislative design than spreading its availability to all dependent spouses * * *. It would be a totally inappropriate response to the problem at hand." While suspending the authorization to grant counsel fees would have an impact of lesser severity than the suspension of alimony, the principle is the same. Public policy encourages the equitable resolution of matrimonial disputes (see, e. g., *Kay v. Kay,* 37 N. Y. 2d 632, 637). Accordingly, this court construes sections 237 and 244 of the Domestic Relations Law as constitutional since we deem them to authorize counsel fees to either spouse on a gender-neutral, needs-basis only. Such a construction is consistent with the traditional rule that where a statute has been found to violate the equal protection clause, courts will traditionally read into it the improperly excluded class (see, e. g., *Califano v. Westcott,* U. S. [47 U.S.L.W. 4817, 4821] [aid to dependent children benefits]; *Califano v. Goldfarb,* 430 U. S. 199 [Social Security Act survivorship benefits]; *Weinberger v. Wiesenfeld,* 420 U. S. 636, *supra* [same]; *Frontiero v. Richardson,* 411 U. S. 677, *supra* [armed forces fringe benefits]; *Levy v. Louisiana,* 391 U. S. 68 [wrongful death actions]; *Matter of Passante v. Walden Printing Co.,* 53 A. D. 2d 8, 13 [worker's compensation survivorship benefits]). Furthermore, there is precedent for reading other statutes in tandem for the purpose of resisting constitutional challenges (see *Matter of Carter v. Carter,* 58 A. D. 2d 438, 446, *supra* [Family Ct. Act, §§ 413, 414 read in tandem]; see, also, *Tessler v. Siegel,* 59 A. D. 2d 846 [same]). In the instant

case, section 238 of the Domestic Relations Law presently allows the trial court to require either party to pay the expenses of the other, including counsel fees. This statute, therefore, provides on its face a statutory mechanism by which the trial court may award counsel fees to the husband in a limited proceeding. Additional authority is found in CPLR 8303 (subd. [a], par. 2), which provides for the granting by the court of a "discretionary allowance * * * to any party to a difficult or extraordinary case, where a defense has been interposed." It has been suggested by the Attorney-General that since "[n]o precedent has been found for the instant situation," applications for counsel fees for husbands are consequently "extraordinary" within the meaning of the statute. By resort to either of the foregoing statutes, sections 237 and 244 of the Domestic Relations Law can be constitutionally read as substituting the word "spouse" for "wife."

V.

Finally, we address ourselves to the issue of retroactivity. We hold that our construction of these statutes shall have prospective effect only in proceedings pending on the date of the *Orr* decision, March 5, 1979. All other awards of counsel fees which had been conclusively adjudicated as of that date shall not be affected by our holding today. There exists no constitutional impediment to applying changes in law only in cases pending as of the date of such decision (see *New York Public Interest Research Group v. Steingut,* 40 N. Y. 2d 250, 260-261, citing *Hurd v. City of Buffalo,* 41 A. D. 2d 402, 405, affd. 34 N. Y. 2d 628; *Incorporated Vil. of Northport v. Guardian Fed. Sav. & Loan Assn.,* 87 Misc. 2d 344, 348-350 [Lazer, J.], affd. 54 A. D. 2d 893; cf. *Matter of Gowan v. Tully,* 45 N. Y. 2d 32, 34). The Supreme Court of the

United States in *Chevron Oil Co. v. Huson* (404 U. S. 97, 106-107) observed that there are three factors to consider in deciding the issue of retroactivity: (1) does the decision establish a "new principle of law, either by overruling clear past precedent on which litigants may have relied * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed"; (2) does an examination of the prior history indicate "'whether retrospective operation will further or retard its operation'"; and (3) does it appear that the decision "'could produce substantial inequitable result if applied retroactively.'" With respect to the *Orr* decision, it cannot be doubted that it overruled clear past precedent relied upon ceaselessly and that retroactive application prior to March 5, 1979 would produce chaotic, inequitable results (see, also, *Laka v. Laka,* N.Y.L.J., March 20, 1979, p. 12, col. 3).

VI.

Accordingly, the matter must be remitted to the trial court for a hearing *de novo.* At such a hearing, both parties may apply for counsel fees. The trial court will make a decision *de novo* as, in the court's discretion, justice requires, having regard to the economic needs of both parties and the circumstances of the case.

Lazer, Gulotta and Mangano, JJ., concur in the opinion of Mr. Justice O'Connor.

B/mc

Frank D. O'Connor, J. P.
Leon D. Lazer
Frank A. Gulotta
Guy J. Mangano, JJ.

———AD2d——— A—June 19, 1979

2749 E/77
926 E Lucy Gant Childs, respondent,
E v. Theodore Q. Childs, appellant.

John J. Von Der Lieth, New York, N. Y., for appellant and appellant *pro se.*

Lans Feinberg & Cohen, New York, N. Y. (Deborah E. Lans and Robert Stephan Cohen of counsel), for respondent.

Robert Abrams, Attorney-General, New York, N. Y. (Robert J. Schack and George D. Zuckerman of counsel), appearing pursuant to Executive Law, §71.

Appeal by the defendant husband from (1) so much of an order of the Supreme Court, Westchester County (CARUSO, J.), dated December 30, 1976, as awarded plaintiff a counsel fee of $12,000, plus disbursements, and (2) a further order of the same court (FERRARO, J.), dated July 11, 1978, which, *inter alia,* granted plaintiff's application for a money judgment for arrears in the payment of counsel fees.

By order dated December 27, 1977, this court modified the order dated December 30, 1976 by reducing the counsel fee and, as so modified, affirmed the said order (60 AD 2d 639). On February 22, 1978, the Court of Appeals dismissed the appeal to that court (43 NY2d 946). On March 19, 1979 the Supreme Court of the United States "vacated" the order of this court and remitted the case to this court "for further consideration in light of *Orr v. Orr*" (440 US.....[99 S Ct 1102]) (440 US.....[99 S Ct 1488]).

Order dated December 30, 1976 reversed insofar as appealed from, without costs or disbursements.

Order dated July 11, 1978 modified by deleting therefrom the provision which granted plaintiff's application for a judgment representing arrears in counsel fees. As so modified, said order affirmed, without costs or disbursements.

This case is remitted to the Supreme Court, Westchester County, for further proceedings in accordance with the opinion herein.

Opinion by O'Connor, J. P.

Lazer, Gulotta and Mangano, JJ., concur in the opinion of Mr. Justice O'Connor.

Order and Memorandum Decision of the Court of Appeals, State of New York, dated October 9, 1979.

STATE OF NEW YORK, COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the ninth day of October A.D. 1979

Present,

HON. LAWRENCE H. COOKE, Chief Judge, presiding.

---

2 Mo. No. 877 SSD 89

LUCY GANT CHILDS,

Appellant-Respondent,

vs.

THEODORE Q. CHILDS,

Respondent-Appellant.

The appellant-respondent and respondent-appellant having filed notices of appeal and cross-appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal and cross-appeal be and the same hereby are dismissed without costs, by the Court *sua sponte,* upon the ground that the order appealed from does not finally determine the action within the meaning of the Constitution.

JOSEPH W. BELLACOSA
Clerk of the Court

Decision of The Court of Civil Appeals, State of Alabama in *Orr v. Orr,* Civ. 1006, dated May 30, 1979, on remand from the Supreme Court of the United States.

STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE COURT OF CIVIL APPEALS

OCTOBER TERM 1978-79

Civ. 1006

WILLIAM HERBERT ORR

v.

LILLIAN M. ORR

On Remand from United States Supreme Court

HOLMES, JODGE

This is a divorce case.

After the parties' divorce in 1974, the wife petitioned the Circuit Court of Lee County for a rule *nisi* due to the husband's failure to pay alimony. The husband unsuccessfully defended on the ground that Alabama's alimony statutes, §§ 30-2-51, 52, and 53, Code of Ala. 1975, were unconstitutional. Upon the husband's appeal to this court, we sustained the constitutionality of the statutes. *Orr v. Orr,* Ala.Civ. App., 351 So.2d 904 (1977).

The husband appealed to our supreme court which initially granted certiorari, but which subsequently, without opinion, quashed the writ as improvidently granted. *Orr v. Orr, Ala.,* 351 So.2d 906 (1977).

The husband appealed to the Supreme Court of the United States. That court, on March 5, 1979, held that §§ 30-2-51, 52, and 53 were unconstitutional on the ground that they were violative of the equal protection provisions of the United States Constitution. *Orr v. Orr,* No. 71-1119 (U.S. March 5, 1979). The case was remanded to this court for proceedings consistent with the Supreme Court's opinion.

Upon remand, the wife filed in this court a motion to affirm the judgment rendered in the court below.

The dispositive issue now before us is whether the wife's motion to affirm the original judgment of the trial court should be granted. For the reasons set forth below, we hold that it should and affirm.

We note at the outset that the Supreme Court of the United States in its opinion goes to some length to suggest matters of state law which might well preserve the wife's right to alimony in this instance. Specifically, the opinion suggests that this court can respond to reversal and bind Mr. Orr to continue his alimony payments on two such grounds: (1) by a neutral extension of alimony rights to needy husbands as well as wives, *Orr, supra,* at 3; and/or (2) by determining that, as a contractual matter, Mr. Orr is bound to continue alimony payments by virtue of his stipulated agreement to do so. *Id.* at 15.

Considering the entire proceeding and the importance of the issues raised by this matter, we determine that the motion is properly before this court and that the issues raised therein are appropriate for our consideration. *See State ex rel Knox v. Dillard,* 196 Ala. 539, 72 So. 56 (1916). *See also Bryant v. Moss,* 295 Ala. 339, 329 So.2d 538 (1976); *Sterling Oil of Oklahoma, Inc. v. Pack,* 291 Ala. 727, 287 So.2d 847 (1973).

Our alimony statutes were found to be constitutionally impermissible for the reason that they are underinclusive; that is, they improperly exclude statutory benefits from a

class of individuals on the basis of sex. The wife initially contends that this court can respond to reversal by neutrally extending alimony rights to males as well as females. In support of this contention, she cites *Orr, supra,* in addition to other appropriate authority. We agree.

Where a statute is constitutionally infirm on the basis of underinclusiveness, a court may satisfy the Constitution's commands by either extending benefits to those excluded from the scope of its coverage or by invalidation of the statute in its entirety. *Orr, supra; Welsh v. U.S.,* 398 U.S. 333 (1970). In *Welsh, supra,* the Supreme Court stated:

> Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion. . . . (Citations omitted.) 398 U.S. at 761, Harlan, Jr., concurring.

Courts have on a number of occasions remedied the deficiencies in underinclusive statutes by extending benefits to those impermissibly excluded. See, e. g., *Califano v. Goldfarb,* 430 U. S. 199 (1977); *Weinberger v. Wisenfeld,* 420 U. S. 636 (1975); *Levy v. Louisiana,* 391 U. S. 68 (1965); *White v. Crook,* 251 F. Supp. 401 (M. D. Ala. 1966); *Beal v. Beal,* Me., 388 A. 2d 72 (1978). See also *Eich v. Town of Gulf Shores,* 293 Ala. 95, 300 So. 2d 354 (1974).

The choice between invalidation of a statute or expansion of the scope of its applicability requires, of necessity, an ascertainment of the predominant legislative purpose underlying the statute's enactment. *Beal. supra.* That is to say, given the nature and substance of the statute, its relevant economic, social, and historical im-

plications, can it be concluded that benefits should be terminated to the class of persons whom the legislature intended to benefit. In this instance, we think not.

Alabama's current alimony statutes have their genesis in §§ 1970, 71, and 72, Code of Ala. 1852. As we suggested in our original opinion, this statutory scheme has served a crucial legislative policy; to provide alimony upon the demise of a marriage in order to preserve the economic *status quo* of the parties as it existed during the marriage. *Orr v. Orr,* Ala. Civ. App., 351 So. 2d 904 (1977).

It is clear to this court that the statutes, notwithstanding the deficiency which the Supreme Court found to exist, were at the time of their promulgation substantially related to the appropriate legislative objective of providing monetary assistance to the financially needy wife and that this objective continues, as a pragmatic matter in appropriate circumstances, in its viability today. Furthermore, it occurs to us that the legislature is quite cognizant of the fact that the female in appropriate cases who has virtually contributed her adult life to the maintence of the marital relationship is arguably not destined for "the market place . . . ." Put another way, a female who has virtually never been employed outside the home, but has been a mother, wife, and/or homemaker for a number of years is not in a favored position to obtain gainful employment.

As a matter of predominant legislative purpose then, we are not prepared to eliminate the current statutory benefits available to needy females inasmuch as we are of the opinion that the legislature would not do so. We are in agreement with the Supreme Court of Maine, in *Beal, supra,* which, in its resolution of the issue of

whether to extend or eliminate the benefits of its original alimony statute concluded:

> [A]s between abolishing alimony and making it available to husbands in appropriate cases, [the legislature] would choose the latter. We conclude that the dominant legislative purpose of the alimony statute, as it stood when this action was brought, is correctly served by treating it as extending eligibility to men as well as women. . . . 388 A. 2d at 76.

Because we here respond to reversal by neutrally extending alimony rights to needy husbands as well as wives, we hold that the wife's motion to affirm the judgment rendered below is due to be granted.

We would be remiss in not commenting that we take the above action reluctantly. It has been the policy of this court not to encroach on the legislature's function. We adhere to that policy. However, in view of the magnitude of the problem created by the action of the United States Supreme Court, we are compelled to apply the principle of law which we do in this instance. Unless we take appropriate measures, Alabama will be without an alimony statute. The legislature has not had ample opportunity to respond to this void; it therefore becomes our duty to fill that void by the application of appropriate legal principles.

In view of the above it is unnecessary to reach other issues raised by the motion to affirm.

The judgment of the trial court is due to be affirmed.

Affirmed.

Wright, P. J., and Bradley, J., concur.

Supreme Court, U. S.
FILED
NOV 29 1979
ROBAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-676
Miscellaneous

THEODORE Q. CHILDS,

Petitioner,

against

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT, MILTON MOLLEN, Presiding Justice, and FRANK D. O'CONNOR, LEON D. LAZER, FRANK A. GULOTTA and GUY J. MANGANO, Justices of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department,

Respondents.

MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF MANDAMUS

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TABLE OF CONTENTS

PAGE

Prefatory Statement 1

Statement of Facts 2

POINT I—The motion should be denied because at the time it was filed, statutory methods of appeal were available to petitioner and because in fact, he subsequently has taken an appeal 3

POINT II—The motion should be denied because petitioner has not met his burden of showing that his right to issuance of the writ is "clear and indisputable" 6

Conclusion 9

TABLE OF CASES

Bankers Life & Cas. Co. v. *Holland,* 346 U.S. 379 (1953) 6

Caban v. *Mohammed,* 440 U.S. ——, 99 S. Ct. 1760 (1979) 4, 5

Califano v. *Westcott,* —— U.S. ——, —— S.Ct. ——, 47 USLW 4817 (June 25, 1979) 4, 7

Childs v. *Childs,* 69 A D 2d 406 (1979) 2, 4, 5, 7, 8

Childs v. *Childs,* 440 U.S. 952 (1979 .....2, 3, 6,7, 8

Ex parte Park Sq. Automobile Station, 244 U.S. 412 (1921) 4, 5

Kerr v. *United States District Court,* 426 U.S. 394 (1976) 6

PAGE

Matter of Malpica-Orsini, 36 N Y 2d 568 (1975), app. dsmd. *sub nom. Orsini* v. *Blasi*, 423 U.S. 1042 (1976) 5

Orr v. *Orr*, 440 U.S. 268 (1979) 2, 6, 7

Panama Canal Co. v. *Grace Lines, Inc.*, 356 U.S. 309 (1958) 5

Railroad Commission v. *Pullman Co.*, 312 U.S. 496 (1941) 5

Roberts v. *Roberts*, —— N Y 2d —— (September 6, 1979) 8

Roche v. *Evaporated Milk Assn.*, 319 U.S. 21 (1943) .. 3, 4

Stanton v. *Stanton* (*I*), 421 U.S. 7 (1975) 7

Stanton v. *Stanton* (*II*), 429 U.S. at 504 n. 4 7

Stanton v. *Stanton* (*III*), —— Utah 2d ——, 564 P. 2d 303 (1977) 7

United States v. *Quell*, 172 U.S. 576 (1899) 6

United States Alkali Export Assn., Inc. v. *United States*, 325 U.S. 196 (1945) 4

Will v. *United States*, 389 U.S. 90 (1967) 6

Wold v. *Wold*, —— F2d —— (7 Cir. Mar. 12, 1979), cert. den. —— U.S. ——, 48 LW 3219 (Oct. 1, 1979) 5

Work v. *Rives*, 267 U.S. 132 (1925) 5

STATUTES CITED

28 U.S.C. § 1257 3

PAGE

Rules of the Supreme Court,

Rule 30 9

Rule 31(6) 2

New York Civil Practice Law and Rules,

§ 5601 2

§ 5602 3

New York Domestic Relations Law,

§ 111(1)(c) 4

§ 237(b) 2, 4

New York Family Court Act,

§§ 412, 438 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-676
Miscellaneous

THEODORE Q. CHILDS,

Petitioner,

against

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT, MILTON MOLLEN, Presiding Justice, and FRANK D. O'CONNOR, LEON D. LAZER, FRANK A. GULOTTA and GUY J. MANGANO, Justices of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department,

Respondents.

MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF MANDAMUS

Prefatory Statement

Respondents received petitioner's motion by mail on October 30, 1979. This Memorandum in Opposition is accordingly due November 29, 1979.

Respondents' arguments herein are addressed solely to the motion for leave to file a petition for a writ of man-

damus. Therefore, the underlying legal issues decided by the Court below are discussed only in such detail as is necessary for decision of the motion. Should leave to file a petition be granted, respondents pray additional briefs on the merits be permitted, pursuant to Rule 31(6) of the Rules of the Supreme Court.

Statement of Facts

On March 5, 1979, in *Orr* v. *Orr,* 440 U.S. 268 (1979), this Court held Alabama's alimony statutes invalid under equal protection for permitting awards only to wives after a financial fact-finding directed toward both spouses. Two weeks later, the Court remanded *Childs* v. *Childs,* 440 U.S. 952 (1979), to the Second Department of the Appellate Division of the Supreme Court of the State of New York "for further consideration in light of *Orr* v. *Orr*", *supra. Childs* involved an equal protection challenge to New York's Domestic Relations Law (DRL) § 237(b) which, literally read, authorizes counsel fee awards only to wives after a financial fact-finding directed to both husbands and wives.

On July 11, 1979, respondent Appellate Division rendered a decision in *Childs* on remand, 69 A D 2d 406 (1979), which upheld the constitutionality of DLR § 237(b) by reading it in tandem with other statutes and in accordance with legislative intent to permit the award of counsel fees in matrimonial actions to husbands as well as to wives. The order remitted the proceeding to the trial court for a hearing at which petitioner could apply for counsel fees. Petitioner instead filed a Notice of Appeal as of right under New York Civil Practice Law and Rules (CPLR) § 5601. On October 9, 1979, the Court of Appeals dismissed the appeal because it was from a non-final order.

Petitioner herein was the defendant in the original matrimonial action. He successfully petitioned for a writ of certiorari to this Court and was appellant in the case on remand to the New York Courts. His present motion seeks leave to file a mandamus petition, alleging that respondent Appellate Division failed to comply with this Court's mandate in *Childs.*

On November 6, 1979, subsequent to the docketing of this motion, petitioner moved in respondent Court for an order granting him leave to appeal to the Court of Appeals under CPLR § 5062(a)(1)(i) and/or § 5602(b)(1). As of this writing, said motion has not been decided.

POINT I

The motion should be denied because at the time it was filed, statutory methods of appeal were available to petitioner and because in fact, he subsequently has taken an appeal.

Petitioner has made a motion under CPLR § 5602 in respondent Appellate Division for leave to appeal to the New York Court of Appeals. If this motion is denied, he may still seek leave to appeal from the latter Court itself under the same statute. He may further seek review in this Court by appeal or writ of certiorari under 28 U.S.C. § 1257.

He may likewise appear for the hearing which has been ordered in trial court and apply for counsel fees. If denied, he may, as he did before, appeal all the way to this Court.

In *Roche* v. *Evaporated Milk Assn.,* 319 U.S. 21, 27-8, 32 (1943), this Court held that mandamus does not lie where:

> "a statutory method of appeal has been prescribed . . . [and the Court below] has acted within its jurisdiction and has rendered a decision which, even if erroneous, involved no abuse of judicial power."

Not even the burden and expense of undergoing a possibly unnecessary trial, much less a hearing as here, justifies mandamus without more. *Id.* at 30-31; *United States Alkali Export Assn., Inc.* v. *United States,* 325 U.S. 196, 202-3 (1945).

Petitioner attempts to find an abuse of jurisdiction by characterizing the Appellate Division's statutory interpretation in *Childs* as "judicial legislation" (Petitioner's Motion at 17-23). He relies on a series of cases delimiting proper uses of statutory interpretation and this Court's refusal in *Caban* v. *Mohammed,* 440 U.S. ——, 99 S. Ct. 1760 (1979), to save the constitutionality of New York's DRL § 111(1)(c) by reading that adoption consent statute to cover unwed fathers as well as unwed mothers of children.

But the cases he cites on statutory interpretation clearly show that courts may interpret statutes in the light of legislative intent in order to save their constitutionality. Certainly, this Court's many decisions approving the interpretation of comparable statutes to cover both sexes "suggest strongly" that such readings "are [not] clearly beyond the constitutional competence" of the courts. *Califano* v. *Westcott,* —— U.S. ——, —— S.Ct. ——, 47 USLW 4817, 4821 (June 25, 1979).

Respondents, of course, assert the correctness of their decision. But even if respondents erred in construing DRL § 237(b), that decision is reviewable by appeal, not by mandamus. As this Court held in *Ex parte Park Sq. Automobile Station,* 244 U.S. 412, 415 (1921), even if:

> "the error which the proposition attributes to the ruling below [as to 'the clearly erroneous construction of the statute'] is manifest, . . . where statutory methods of review of jurisdiction were provided for, they could not be disregarded, and therefore . . . there was no power to override the statutory provisions by resorting to the writ of mandamus."

Cf. *Panama Canal Co.* v. *Grace Lines, Inc.,* 356 U.S. 309, 318 (1958); *Work* v. *Rives,* 267 U.S. 132, 177, 183 (1925).

Caban presented a unique situation, quite different from the present one. It was before this Court on appeal, not by mandamus. The statute there in question had been authoritatively and recently interpreted by New York's highest court as inextricably embodying a sex-based classification. *Matter of Malpica-Orsini,* 36 N Y 2d 568 (1975), app. dsmd. *sub nom. Orsini* v. *Blasi,* 423 U.S. 1042 (1976). In view of that reading, there would have been no purpose in remanding *Caban* to see if the statute could be saved by another construction.

Here, however, petitioner seeks review of a court's statutory interpretation by mandamus while simultaneously pursuing his statutory avenues of appeal. Here the State's highest court has never ruled on the proper interpretation of the sex-based classification in the challenged statute. How it will rule on that statute, and indeed whether it will rule on it in the *Childs* case, cannot be foreseen with certainty. Under this Court's usual abstention rules, see *Railroad Commission* v. *Pullman Co.,* 312 U.S. 496 (1941), the State courts should be given an opportunity to construe their own statute before a Federal court rules on its proper interpretation. Cf. *Wold* v. *Wold,* —— F2d —— (7 Cir. Mar. 12, 1979), cert. den. —— U.S. ——, 48 LW 3219 (Oct. 1, 1979). The final ruling of the Court of Appeals, or its refusal to rule until petitioner complies with the mandate for a new hearing, can be reviewed

> "by the exercise by this Court of its power to issue a writ of certiorari in a proper case [.T]here is hence no power to substitute the writ of mandamus as a means of reviewing for the express remedial processes created by the statute for such purpose." *Ex parte Park Sq. Automobile Station, supra,* 244 U.S. at 414.

POINT II

The motion should be denied because petitioner has not met his burden of showing that his right to issuance of the writ is "clear and indisputable."

Even if this motion were not barred by the pendency of an appeal, see Point I *supra,* petitioner has not met his burden of showing enough merit to warrant granting the motion, much less the petition.

In *Kerr* v. *United States District Court,* 426 U.S. 394, 403 (1976), this Court held that:

> "the party seeking issuance of the writ . . . [of mandamus must] satisfy 'the burden of showing that [his] right to issuance of the writ is "clear and indisputable."' *Bankers Life & Cas. Co.* v. *Holland,* [346 U.S. 379], at 384 [1953], quoting *United States* v. *Duell,* 172 U.S. 576, 582 (1899); *Will* v. *United States,* [389 U.S. 90], at 96 [1967]."

Petitioner seeks to carry his burden by arguing, first, that this Court remanded *Childs* solely for legislative action, barring the Courts below from judicial interpretation (Petitioner's Motion at 15-17). Second, he argues that New York courts may not change the statutory scheme of the State's matrimonial laws (*id.* at 17). Finally, he asserts that the interpretation given the statute by respondents is clearly incorrect (*id.* at 20-22).

Petitioner's first argument does not explain away the clear language of the order remanding *Childs* "for further consideration in light of *Orr* v. *Orr,*" *supra.* Nothing in the order on remand barred the New York courts from exercising their usual powers to construe statutes so as to preserve their constitutionality. See p. 4, *supra.*

Nor is there anything in *Orr* which suggests that State Courts were barred from judicial interpretation of matrimonial statutes to comply with equal protection. While this Court noted that the Alabama courts had interpreted their statutory scheme to bar a gender-neutral reading, 440 U.S. at 270 n. 1, and suggested that legislative action might be necessary, *id.* at 272, in the same paragraph it cited with approval *Stanton* v. *Stanton* (I), 421 U.S. 7 (1975). On its second hearing of the *Stanton* case, this Court specifically interpreted its first decision to require the Utah Supreme Court to apply its statute in a gender-neutral manner. The *Stanton* (II) Court suggested "that the Utah Court legitimately might" reinterpret its statute in the light of the common law or take note of legislative intent as shown by recent Utah laws creating a gender-neutral age of majority. *Id.,* 429 U.S. 501, 504 n. 4* (1977).

The decisions in *Childs* and *Orr* thus in no way suggest that judicial interpretation of matrimonial statutes as gender-neutral in order to satisfy equal protection is an abuse of judicial power. Indeed, the precedents of *Stanton* and *Califano* v. *Westcott, supra,* show that this Court has approved such readings, even where it might be necessary to overrule prior decisions.

As to petitioner's second argument, claiming that the New York courts may not reinterpret the statutory scheme of matrimonial laws as gender-neutral, this issue was briefed at length before respondent Appellate Division and was rejected on the merits, 69 A D 2d at 418-9. The careful treatment of that issue therein and the weighty authority with which the Appellate Division buttressed its finding of power to read the statute as gender-neutral are

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* Considering the case for the third time, the Utah Court interpreted its statute in light of subsequent amendments and read it to set a uniform age of majority for both sexes. *Stanton* v. *Stanton* (III), —— Utah 2d ——, 564 P. 2d 303 (1977).

sufficient to show that the Court was not clearly and indisputably wrong.

Notably, the New York Court of Appeals recently remanded an appeal involving similar statutes, FCA §§ 412, 438 (providing support and counsel fees for wives but not husbands), for a determination as to whether the laws' constitutionality could be preserved by statutory interpretation. *Roberts* v. *Roberts*, —— N Y 2d —— (September 6, 1979). While the order was on jurisdictional grounds and cannot be said to presage how the Court will finally rule, it does show that respondents were not acting beyond their powers in their decision in *Childs*.

To the extent that petitioner has raised a serious claim under the State Constitution that New York's courts may not reinterpret matrimonial statutes (Petitioner's Motion at 17-18), this claim clearly was not passed upon in *Orr* or *Childs* and could not form a predicate for a mandamus to conform with those rulings. More importantly, the likelihood that this issue—which could involve a radical re-evaluation of New York's constitutional history, reaching back to the early 1600's, see Attorney General's Brief, Point II.C, *Childs* v. *Childs* (2d Dept)—would have to be confronted were the motion granted, and the certainty that this Court would abstain from passing upon it until the New York Court of Appeals did so, see p. 5 *supra*, are further reasons to deny the motion.

As to petitioner's third claim, that respondents' reading of the statute is incorrect, until the State's highest court has ruled on it, the answer to that question is uncertain. But the unanimity with which every other State court to face the issue has also read the laws as gender-neutral* at the least shows that respondents' reading was not clearly and indisputably wrong.

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* One trial court initially held DRL § 237 unconstitutional. It has since vacated that judgment in light of *Childs*.

Issuance of a writ of mandamus is a matter of the Court's "sound discretion sparingly exercised," Rule 30, even where the petitioner has shown his right to relief. Where, as here, petitioner's right to relief is neither clear nor indisputable, the motion for leave to file a petition should be denied.

CONCLUSION

The motion for leave to file a petition for a writ of mandamus should be denied due to the existence of statutory methods of appeal, which petitioner is already pursuing, and due to his failure to show a "clear and indisputable" right to its issuance.

Dated: New York, New York
November 28, 1979

Respectfully submitted,

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